STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Referee David G. Myers
Sanilac County Friend of the Court
60 W Sanilac Road
PO Box 187
Sandusky, MI 48471
_____/

Formal Complaint No. 86

EXAMINER'S SANCTIONS BRIEF

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STATEMENT OF FACTS

The Commission filed a formal complaint (Exhibit 1) in this matter on June 15, 2010, based on assertions that Respondent violated the Michigan Code of Judicial Conduct and Michigan Court Rules by driving a motor vehicle while intoxicated, and being convicted of a misdemeanor for that offense. Respondent filed an answer (Exhibit 2) on June 24, 2010, where he admitted all of the underlying factual assertions, as reflected in paragraphs 1 through 18 of the complaint. He further admitted that his actions violated Michigan Code of Judicial Conduct Canons 2A and 2B, and MCR 9.104(A)(2), in his answer to subparagraphs d (in part), e, f, and g of the closing paragraph of the complaint.

The most relevant facts established by the admissions are as follows. Between 6:30 p.m. on September 22, 2009, and approximately 12:30 a.m. the next day, Respondent consumed two 12-ounce beers at home, then shared three pitchers of beer with one other person, consumed two additional 12-ounce beers, and drank two shots of whiskey at Brentwood Lanes Bowling Alley in Caro, Michigan.

At approximately 12:45 a.m. on September 23, 2009, Respondent left Brentwood Lanes driving his automobile, to go to his home in Caro. He was stopped by a Caro police officer at approximately 12:50 a.m., after he was observed driving on the wrong side of the road, and backing up his car in the street into an intersection. Respondent failed several field sobriety tests, and a

preliminary breath test reflected a blood alcohol reading of .21%. Two DataMaster breath tests conducted at the police station at approximately 1:30 a.m. each registered a blood alcohol content of .20 grams alcohol per 210 liters of breath.

A misdemeanor complaint was issued against Respondent in the 71-B District Court, in *People v David G. Myers,* Case No. 2009-1198-SD, charging Respondent with operating a motor vehicle while intoxicated, pursuant to MCL 257.625(1). On January 29, 2010, Respondent pled guilty to the charge of operating a motor vehicle while intoxicated, and was sentenced to pay costs and fines, attend Alcoholics Anonymous, and serve probation for three months.

The Commission issued an order on July 16, 2010, for the Examiner to withdraw the Petition for Appointment of a Master, as Respondent's admissions relieved the Examiner from presenting evidence to support the charges. The order directed the parties to submit briefs addressing sanctions and the remaining disputed non-factual assertions in the complaint.

ARGUMENT

A. Introduction

This case is extraordinarily simple. Respondent is a referee, and is subject to the jurisdiction of the Judicial Tenure Commission, the Michigan Code of Judicial Conduct ("MCJC"), and the Michigan Court Rules addressing judicial conduct,

pursuant to MCR 9.201(B)(2). His wrongdoing is conclusively established by his answer to the formal complaint, where he admitted all of the underlying facts, that he operated a motor vehicle while intoxicated, and that he was convicted of that offense. The only remaining issue is the severity of the sanction which should be imposed on him.[1]

B. Standard of proof

The standard of proof in disciplinary cases is that the facts must be proven by a preponderance of the evidence. *In re Ferrara*, 458 Mich 350, 360 (1998); *In re Haley,* 476 Mich 180, 189 (2006); MCR 9.211(A). Respondent's admissions have established all of the facts alleged in the complaint to be true, as noted by the Commission in its order of July 16, 2010.

C. Commission's standard of review

The Commission reviews the findings of fact and conclusions of law *de novo.* In the present matter, as there is no factual dispute, only the legal conclusions and recommendations of the Commission as to an appropriate sanction

[1] Respondent contends in his affirmative defenses that the filing of the complaint on June 14, 2010, violates the doctrines of laches and/or estoppel. Respondent ignores the facts that he self-reported the incident on February 1, 2010 (four months after it occurred), which is a delay attributable to him. The Commission opened a file, conducted an investigation, obtained his comments, issued and received a reply to a 28-day letter, and filed a formal complaint in a four and a half month period. Respondent has admitted all of the factual allegations, and has not asserted that he is disadvantaged as to his ability to defend the formal complaint. His arguments as to those doctrines seemingly focus on the impact of a suspension, which is not relevant to these defenses.

are ultimately subject to review by the Supreme Court. *In re Chrzanowski,* 465 Mich 468, 481 (2001) This brief is submitted pursuant to MCR 9.215.

D. Acts of judicial misconduct

After a police officer observed Respondent driving on the wrong side of the road and backing his car into an intersection, and stopped him, Respondent's blood alcohol level measured at .21% based on a preliminary breath test. It measured .20 grams alcohol per 210 liters of breath based on two DataMaster tests administered approximately 40 minutes after the stop. Respondent subsequently pled guilty to operating a motor vehicle while intoxicated, pursuant to MCL 257.625(1).

Respondent drove drunk, a violation of MCL 257.625(1). A judge must respect and observe the law. MCJC Canon 2B. Drunk driving is more than just a failure to respect and observe the law: it is a selfish act that endangers not only the drunk driver but the general public as well.

Moreover, this act of drunk driving was particularly egregious. The legislature has determined that a blood alcohol level of .08 constitutes being too drunk to drive. Respondent's level was nearly three times that limit, demonstrating an almost depraved indifference to the law or the consequences of his actions. In fact, as of October 31, 2010, the drunk driving statute imposes a maximum sentence of up to 180 days in jail upon conviction if the blood alcohol is .17 or higher. Currently that maximum penalty is 93 days.

The legislature, as the voice of the sovereign people of this state, has recognized that a person driving with so elevated a blood alcohol level has shown brazen disrespect for the law. Respondent was driving with a blood alcohol level even higher than the super-drunk new standard of .17; he was .20-.21, nearly three times the current law allows and nearly 20% higher then the new super-drunk standard.

Such utter disregard for the law evidences a contempt for it. Respondent, as a judicial officer, has a duty to respect the law, but he has brought shame to his office and shaken the public's confidence in the judiciary.[2] His extreme violation calls for the strictest of sanctions to protect the public and to preserve the integrity of the judiciary, which is the point of the judicial discipline system. *Ferrara, supra* at 372; *In re Noecker,* 472 Mich 1, 12 (2005)

Based on the undisputed facts, Respondent's conduct constitutes:

a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;

b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205;

[2] Even if Respondent argues that his criminal conviction should restore the public's confidence in the judiciary, he misses the point. His act – driving so drunk that the legislature has singled that level of drunkenness out for the strictest punishment – is what causes the public to lose confidence in the judiciary. It was the act of a neutral third party – the judicial system itself – that originally helped restore the public's faith by not giving Respondent a break in his criminal case. The Commission should do likewise and recommend a strict discipline to help restore the integrity of the judiciary.

independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;

d) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

e) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;

f) Failure to respect and observe the law and to conduct himself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B; and

g) Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(A)(2).

The Examiner is compelled to address Respondent's assertion that as the misconduct did not occur in the course of his employment, and he is not an elected official, it did not violate paragraphs a through d, above. He appears to be under the misguided impression that the phrase "misconduct in office" specifically means judicial duties, and that he is held to a different standard as he does not hold an elected office. In fact, "misconduct in office" addresses any improper conduct, on or off the bench, taken while the individual holds a judicial office. The term "judge" includes referees and magistrates [MCR 9.201(B)(2)], which are appointed positions. Clearly, the gravity of Respondent's improper act of driving while intoxicated is not lessened by the fact that it did not involve his actual duties as a

intoxicated is not lessened by the fact that it did not involve his actual duties as a referee, or that he was not elected.[3]

The concept that the code covers all conduct of a judicial officer, regardless of whether it relates to judicial duties, is directly addressed in Michigan Code of Judicial Conduct Canon 2A, as follows:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

All persons holding judicial office are held to a higher standard, which applies to conduct not involving judicial duties. Respondent's operating a motor vehicle while intoxicated, a misdemeanor, *did* impact his judicial office. His assertions to the contrary arguably serve as evidence that he is not freely and willingly accepting the restrictions and public scrutiny associated with his position as a judicial officer.

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[3] Respondent asserts in his affirmative defenses that his status as an unelected referee means he is similarly situated to an attorney, and should be disciplined like one under the doctrine of equal protection. Respondent has admitted he is a referee, and is subject to the Code of Judicial Conduct and Michigan Court Rules governing judicial discipline. He holds a judicial office, and neither the Code nor the court rules provide for dissimilar treatment to an appointed, rather than elected, judicial officer. Further, the Supreme Court has regularly exercised jurisdiction over, and imposed discipline on, non-elected judicial officials, including Magistrate James Conrad, who received a 180-day suspension from his magistrate duties for two incidents of drunk driving; *In re Conrad,* 472 Mich 1242 (2005).

SANCTIONS

MCR 9.216 requires that a brief submitted to the Commission in relation to a public hearing include a discussion of sanctions.

A. Criteria for assessing an appropriate sanction

The purpose of judicial discipline is not to punish, but to maintain the integrity of the judicial process and to protect the citizenry from corruption and abuse. *In re Seitz*, 441 Mich 590, 624 (1993); *Haley, supra* at 195. In assessing the appropriate sanction, the primary charge "is to fashion a penalty that maintains the honor and integrity of the judiciary, deters similar conduct, and furthers the administration of justice." *In re Hocking,* 451 Mich 1, 24 (1996) As punishment is not a purpose of judicial discipline, there is "not much room for mitigation." *Seitz* at 624-625.[4]

B. The *Brown* factors

The Michigan Supreme Court has established specific factors to utilize in assessing an appropriate sanction for judicial misconduct in *In re Brown,* 461 Mich 1291, 1292-1293 (1999). The Supreme Court noted that the Commission "should

[4] Respondent's assertion in his affirmative defenses that the criminal penalties imposed on him satisfy his sanction is grossly mistaken. It does nothing to maintain the honor and integrity of the judiciary, or deter similar conduct by judicial officials. In fact, Respondent is asserting that he should be treated just like any other criminal offender, while his position as a judicial officer belies that treatment (as noted by the Michigan Supreme Court in *Hocking,* above, and confirmed in *Chrzanowski, supra* at 488).

consider and other appropriate standards that it may develop in its expertise, when it offers its recommendations." *Id.* at 1293. The considerations, regularly applied by the Supreme Court in judicial disciplinary cases since 1999, are:

(1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct

There is no evidence of a pattern of misconduct, although there is every reason to suspect that this was not the first time that Respondent drove drunk.

(2) misconduct on the bench is usually more serious than the same misconduct off the bench

The underlying conduct in this case was not committed on the bench. However, the nature of the offense (a misdemeanor committed by a judicial officer) directly impacts the integrity and authority of the judicial office held by Respondent, just as on-the-bench conduct would.

(3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety

Respondent's action is prejudicial to the administration of justice, as the commission of a misdemeanor by a judicial officer is an impropriety (rather than an act creating merely an appearance), that decreases the integrity of the judicial office held by Respondent. His personal conduct reflects a blatant disregard for the law, and litigants may conclude that his approach could extend to his decisions as a

referee, and question his determinations in proceedings.

(4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does

As asserted above, Respondent's actions clearly implicate the administration of justice and the appearance of impropriety, in that he committed a misdemeanor that decreases the integrity of the judicial office held by Respondent.

(5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated

The Examiner asserts that Respondent's actions were clearly premeditated and deliberate. On September 22 and 23, 2009, he drank 11 or 12 beers, plus two shots of whiskey, between 6:30 p.m. and 12:30 a.m. He then proceeded to drive a motor vehicle while intoxicated. The consumption of an excessive amount of alcohol, and then making the decision to drive home, were deliberate acts. He clearly should not have driven after consuming that much alcohol.

(6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery

Respondent's actions did not undermine the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach a result in a case.

(7) **misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship**

Respondent's actions were not based on an unequal application of justice.

C. Responsibility and remorse

Respondent has admitted that he engaged in the conduct at issue. However, he asserted in his responsive pleadings that he should not be disciplined for the conduct as the criminal penalty imposed on him "satisfies" any punishment he should face. He contends that as his misconduct did not relate to his duties as a referee, and as he is not an elected official, his sanction should be different. Respondent is attempting to avoid responsibility, and an accompanying appropriate sanction, for his *judicial* misconduct. He is a *judicial officer*, has committed a misdemeanor, and should be sanctioned accordingly.

In his responsive documents submitted to the Commission, Respondent has failed to express remorse for his actions, or for the negative impact that they have had on the judiciary. In fact, his focus has been in the opposite direction, as he has attempted to minimize the impact of his misconduct. Respondent claims it matters that he is not elected, his misconduct did not concern his duties as a referee, and he has served his criminal sentence. In fact, Respondent's only acts other than to admit the facts have been geared at avoiding the imposition of a suspension (which

is the standard sanction in cases where judicial officers have committed misdemeanors, as set forth below). His attempt to downplay the impact of his conduct, and failure to accept his responsibility for a fitting sanction (and efforts to avoid a sanction), speaks volumes.

D. Proportionality

In addition to addressing the *Brown* factors, the Commission must also consider similar disciplinary actions in both this state and other jurisdictions, in order to determine an appropriate disciplinary sanction. *Haley* at 188. The Commission is not limited to the factors set forth in *Brown* when addressing sanctions, as the Supreme Court stated: "The JTC should consider these and other appropriate standards that it may develop in its expertise, when it offers its recommendation." *Id.* at 1293. Included in the sanction analysis is what is now commonly referred to as the "proportionality" consideration (and was first set forth by the Supreme Court in *Brown* at 1293-1295) is done in an attempt to provide "evenhandedness in treatment of judicial discipline cases." *Id.* at 1295.

Five recent Michigan cases involves the commission of a misdemeanor (or facts that could be considered a misdemeanor) by a judicial officer, including three where the offense was drunk driving. In *In re Halloran,* 466 Mich 1219 (2002), the Supreme Court suspended Judge Richard B. Halloran for 90 days, by consent, based on activity that constituted indecent exposure. In *In re Gilbert,* 469 Mich

1224 (2003), the Supreme Court suspended Judge Thomas S. Gilbert for 6 months, based on his admission that he used marijuana at a rock concert and approximately twice per year while he was a judge. Judge Gilbert had consented to a suspension of 90 days, with credit for 28 days of paid leave that he had taken, but the Supreme Court deemed that to be an insufficient sanction.

The three most recent cases addressed drunk driving. In *In re Conrad,* 472 Mich 1242 (2005), Magistrate Judge James P. Conrad was suspended for 180 days, by consent, for two incidents where he drove while intoxicated. Although neither charge resulted in a conviction, Magistrate Conrad stipulated to the fact that in 1998, he was stopped by police and two breathalyzer tests established his blood alcohol level was .20. In 2003, he was stopped again, and two breathalyzer tests established his blood alcohol level was .21.

In *In re Steenland,* 482 Mich 1230 (2008), Judge Catherine Bove Steenland was suspended for 90 days, after she pled guilty to a charge of operating a motor vehicle while visibly impaired. Her blood alcohol level at the time of her arrest was .23. Finally, in *In re Nebel,* 485 Mich 1049 (2010), Judge Charles C. Nebel plead guilty to operating a motor vehicle while impaired, after a traffic stop where his blood alcohol level was found to be .09.

When the facts established in the present matter are considered in light of those cases, there are grounds to exceed the typical 90-day suspension which is

"guide" that has recently been used when determining sanctions for a solitary first misdemeanor committed by a judicial officer. Each of the 90-day suspensions involving a solitary first misdemeanor were by consent. The Examiner does not contend that Respondent's failure to enter into a consent agreement is a factor to be taken to his detriment, as he certainly has the right to have the sanctions issue addressed by the Commission and the Supreme Court. The Examiner merely wishes to emphasize that the other suspensions addressed above were reached in a negotiated process, and voluntarily accepting a sanction through a stipulated settlement inherently benefited the respondent judicial officers in those cases.

The also Examiner does not propose that the Commission recommend a six-month suspension without pay (as Respondent's alcohol abuse related to once incident, unlike Magistrate Conrad's two incidents, and Judge Gilbert's use of marijuana on several occasions). But the Commission should consider that Respondent consumed 11 or 12 beers, plus two shots of whiskey, over a period of six hours. His blood alcohol level was measured at .21% and .20 grams alcohol per 210 liters of breath, soon after he observed by an officer driving on the wrong side of the road, and backing up in the middle of the street into an intersection.

The amount Respondent drank, and his resulting blood alcohol level, are significant as the State of Michigan has steadily increased the penalty for drunk driving. Although not in effect when Respondent committed offense, the new

"super-drunk" classification in the Motor Vehicle Code (which will take effect on October 31, 2010) imposes more severe penalties on drivers (like Respondent) who have a blood alcohol content greater than .17, regardless of whether it is a first offense. A conviction under the super drunk driving law could result in more severe penalties, including use of a breath alcohol ignition interlock for one year, higher fines and costs, one year of alcohol rehabilitation, and more jail time.

The Examiner does not assert that Respondent should be held responsible for any greater sanction because the more severe criminal penalties under the revised drunk driving law are not yet in effect. Rather, the Examiner asserts that the super-drunk penalties reflect society's increasing intolerance for the abuse of alcohol, particularly to the severe extent which Respondent did. As set forth in the Code of Judicial Conduct, one who serves as a judicial officer should be particularly aware of the implications of violating the law, and society's dim view of judicial officers engaged in such conduct.

Based on the other judicial disciplinary cases involving misdemeanor offenses, and the unique facts present in this matter, the Examiner urges the Commission to recommend that Respondent be publically censured and suspended without pay from his position as a Sanilac County referee for a period of 120 days.

CONCLUSION

Respondent has failed to observe high standards of conduct so that the integrity and independence of the judiciary are preserved, and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. He is guilty of misconduct in office and conduct clearly prejudicial to the administration of justice within Article 6, Section 30 of the Michigan Constitution, as amended, and MCR 9.205, that warrants the imposition of sanctions.

The Examiner urges the Commission to recommend that the Michigan Supreme Court impose a sanction of public censure on Referee David G. Myers, and suspend him without pay from his duties as a Sanilac County referee for a period of 120 days.

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Dated: August 19, 2010